MOTION FILED
JUN 2 1978

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1288

JOHN PHILIP QUAGLINO,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AMICUS CURIAE

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
445 Sutter Street, Suite 501,
San Francisco, California 94108,
Telephone: (415) 421-4347,
Attorneys for Amicus Curiae.

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CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ"), by its attorneys EPHRAIM MARGOLIN and NICHOLAS ARGUIMBAU hereby move the Court for an order permitting them to file the within brief in support of the petition for writ of certiorari in this case. This brief is being filed and served contemporaneously with the filing of the re-

sponse to the petition requested of the Solicitor General by this Court.

The petitioner assents to this motion. It is opposed by the People of the State of California.

Dated, San Francisco, California,
June 1, 1978.

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
By EPHRAIM MARGOLIN,
Attorneys for Amicus Curiae.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ("CACJ") is a statewide organization of attorneys active in criminal defense. CACJ represents approximately 1500 lawyers in California. We appear amicus in cases of wide significance, especially when they raise novel constitutional issues of significant import to the criminal bar.

In addition, CACJ filed an amicus brief in support of the petition for hearing in the Supreme Court of California.

QUESTIONS PRESENTED

1. Whether the admission of the identification testimony of an eyewitness who has been subjected to hypnotic memory "enhancement," either generally or on the facts of this case, violates the defendant's right to confront the witnesses against him, in violation of the Sixth Amendment of the United States Constitution.

2. Whether the admission of the identification testimony of an eyewitness who has been subjected to hypnotic memory "enhancement," either generally or on the facts of this case, violates the due process standards under the Fifth Amendment of the United States Constitution for admissibility of evidence of eyewitness identifications.

ARGUMENT

INTRODUCTION

The use of hypnosis as a tool in criminal prosecutions is rapidly on the rise throughout the country. For the Court's enlightenment, one of the world's leading authorities in the field, Dr. Martin Orne,[1] has provided an affidavit (submitted under separate cover by this party) briefly reviewing the use and abuse of hypnosis in the criminal field. Of special concern to the amicus and to this Court should be the widespread problems this law enforcement "tool" is creating. As Dr. Orne points out, there are so few true authorities in the field and so many law enforcement agencies (and defense attorneys) using it to "augment" the memories of witnesses, that uniform nationwide guidance by the courts is necessary to prevent miscarriages of justice by the thousands.

There is a consensus among the authorities that hypnosis is at best a dangerous procedure which is "like a scalpel: you wouldn't want it wielded by your janitor, only by your surgeon."[2] And at worst, hypnosis can produce undetected and undetectable perjury, because the subject may be so completely convinced

[1]Nearly three decades ago Orne published the first discussion of hypnosis and the law: "Hypnotism, Suggestibility and the Law," 31 Nebr.L.Rev. 575 (1952). See also Orne, "The Nature of Hypnosis: Artifact and Essence," 58 Jour. Abnormal and Social Psychology 277-299, and Orne, "The Simulation of Hypnosis: Why, How and What it Means," 19 Int.Jour.Clin. & Exp. Hypnosis 183-210 (1971).

[2]Erika Fromm, quoted in Hilgard, "Hypnosis Is No Mirage," 86 Psychology Today 121-128, at 127 (November 1974).

of a false memory implanted through hypnosis that he or she can pass a lie detector test.[3]

The refusal of the California Supreme Court, by a 4-3 vote, to hear the present case was reported in the American Bar Association Journal, which stated in part:

> The master trial lawyer must be a kind of hypnotist, able to draw judge and jury into a world where only his words hold truth.
>
> But the time is fast approaching when hypnosis will assume an out-front role in the courtroom, and it is not the jurors, but the witnesses, who will be entranced.
>
> * * *
>
> The California Supreme Court refused by a 4-3 vote in December to hear the appeal of a murder conviction in which testimony induced under hypnosis played a major role.
>
> * * *
>
> *The court's decision is "incredible" and "horrible" to Dr. Ernest R. Hilgard, former president of the International Society of Hypnosis and director of the Stanford University Laboratory of Hypnosis Research. Dr. Martin T. Orne, current president of the society and a professor at the University of Pennsylvania, agrees. . . .*
>
> Hypnosis, even as an investigative tool, is unreliable and unpredictable, say the doctors. People can flat-out lie under hypnosis, and the examiner is no better equipped to detect the hypnotic lie

[3]Weinstein, Abrams and Gibbons, "Validity of the Polygraph with Hypnotically Induced Repression and Guilt," 126 Am.Jour. Psychiatry 143-146 (1970).

than any other kind. Even more serious, a willing hypnotic subject is more pliable than he normally would be, more anxious to please his questioner. Knowing even a few details of an event, often supplied in early contacts with police, may provide the subject with enough basis to create a highly detailed "memory" of what transpired, whether he was there or not.

After the hypnotic session, the subject may recall the hypnotically induced memory as an authentic one. It well may be authentic, but neither the subject nor anyone else can separate the "reproduction" from the "production," says Orne. Memory distortion occurs under hypnosis in the same ways it ordinarily occurs, but it is exaggerated, says Hilgard.

Dr. Martin Reiser, director of the Los Angeles Police Department's behavioral-sciences services, does not dispute what Orne and Hilgard say. But he argues that those problems should not prevent the use of a valuable investigative tool. Reiser also runs Law Enforcement Hypnosis Institute, Inc., a private profit-making corporation in Los Angeles. It has now trained nearly 300 persons, mostly police but also a few lawyers and one judge, in hypnosis.

Reiser says his students are highly trained and professional investigators, from all ranks of police, who are instructed not to trust the hypnotic information but to corroborate everything with independent proof. But there was no corroboration that Quaglino had bought the hit-and-run car in the Santa Barbara police case. . . .

* * *

[W]ith witnesses "contaminated" by the hypnotic process, totally convinced of the accuracy of their recall, Orne and Hilgard fear hypnotic evidence will assume unwarranted significance in the nation's courts as a magic test for truth.

"Hypnotized Witnesses May Remember Too Much," 64 ABAJ 187 (February, 1978). (Emphasis added.)

For reasons which follow, this Court can and should intervene to prevent the threat to criminal justice noted by the American Bar Association Journal from becoming a reality.

The facts of the case are set forth in detail in the petition filed on behalf of Quaglino;[4] consequently, this brief will concentrate on what the amicus perceives as the guiding legal principles.

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[4]It should be noted that the record was augmented in the California Supreme Court to include, in particular, expert testimony on hypnosis from the first trial, which resulted in a hung jury. That part of the record is properly before this Court. It should also be noted that the scientific publications relied upon by the petitioner were placed before the California Supreme Court and that under California and federal law such publications are judicially noticeable. See, *e.g.*, *People v. Kelly*, 17 C.3d 24, 35, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976); *United States v. Addison*, 498 F.2d 741, 744-745 (D.C. Cir. 1974). Consequently, these publications are properly relied upon in this proceeding.

I. PERMITTING A PROSECUTION WITNESS TO TESTIFY TO IDENTIFICATION OF THE ACCUSED AFTER HYPNOTIC MEMORY "ENHANCEMENT," ABSENT PROPER SAFEGUARDS, DENIES THE DEFENDANT HIS RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause is made applicable to state criminal prosecutions through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Basic to the right of confrontation is the right of cross-examination, *Pointer, supra,* 380 U.S. at 404. As the Court said in *Pointer,*

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.
>
> 380 U.S. at 405.

This Court, in requiring that counsel be present at pretrial lineups, relied in part on the threat to effective cross-examination which pretrial identification procedures frequently present:

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. Texas*, 380 US 400, 13 L ed 2d 923, 85 S Ct 1065.
>
> *United States v. Wade*, 388 U.S. 218, 236, 87 S.Ct. 192-6, 18 L.Ed.2d 1149 (1967).

Moreover, the Court has recently reaffirmed that *Wade* and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967), sought to preserve the right of confrontation from undue pretrial manipulation of witnesses. *Moore v. Illinois,* ..... U.S. ....., 54 L.Ed.2d 424 (1977).[5]

The danger perceived in *Wade* and *Moore* was that a pretrial procedure might so solidify a witness' views as to prevent effective cross-examination, thereby depriving the defendant of the Sixth Amendment right to confront his accusers. In other areas too, the Confrontation Clause is read to prevent reliance upon testimony which is solidified by pretrial suggestions. For instance, this Court noted in *California v. Green*, 399 U.S. 149, 159, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), which considered the applicability of the Confrontation Clause to the admissibility of prior inconsistent statements,

> . . . The main danger in substituting subsequent for timely cross-examination seems to lie in the

[5]See particularly the Court's reference to the danger that a witness who has once made an identification "will be predisposed to adhere to this identification in subsequent testimony at trial," and the suggestion that one function of counsel at a lineup could be "to cross-examine the [witness] to test [his or her] identification before it hardened." Note 5, 54 L.Ed.2d at 435.

> possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

There is no practice in which false testimony is more "apt to harden and become unyielding to the blows of truth" than hypnosis. Absent a validation procedure such as that suggested by the petition below (*i.e.*, confirmation of the reliability of the procedure as viewed by the scientific community, under *People v. Kelly*, 17 C.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 [1976] and *Frye v. United States*, 293 F. 1013 [D.C. Cir. 1923]) testimony of a prosecution identification witness who has undergone hypnosis on the subject of his testimony must be viewed as inadmissible as in violation of the defendant's rights of confrontation and cross-examination.

II. BY REASON OF THE HYPNOTIC PROCEDURES USED IN THIS CASE, THE EYEWITNESS IDENTIFICATION WAS NOT SUFFICIENTLY RELIABLE TO MEET THE REQUIREMENTS OF DUE PROCESS.

It is too well-established a principle to be questioned that:

> The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear,

> resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.
>
> *Napue v. Illinois*, 360 U.S. 264, 271, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959).

The principle is still very much alive. See, *e.g.*, *Codispoti v. Pennsylvania*, 418 U.S. 506, Note 6 at 517, 41 L.Ed.2d 912, 94 S.Ct. 2687 (1974). This Court's willingness to review the facts in eyewitness-identification cases is illustrated by the detailed factual discussion in *Manson v. Brathwaite*, ... U.S. ....., ... S.Ct. ....., 53 L.Ed.2d 140, 154-156 (1977).

There has been a great deal of ferment in the area of eyewitness identification in the last decade. In the famous "Wade Trilogy" of *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967) and *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967), this Court recognized that the Constitution requires more than mere relevance to permit the admission of possibly unreliable eyewitness identifications, and that special safeguards such as presence of counsel are necessary during pretrial identification. In *Stovall* the Court held that it was a "recognized ground of attack upon a conviction" that a pretrial identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process.

In a number of subsequent cases relying upon *Stovall*, it was held that "unnecessarily" suggestive

pretrial identification procedures would be subject to an exclusionary rule. Following the holding of *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968) that (at least in the context of a pre-*Stovall* conviction) exclusion will only be required when the pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and the holding of *Neil v. Biggers*, 409 U.S. 188, 199, 34 L.Ed.2d 401, 97 S.Ct. 375 (1972) that the more stringent "unnecessarily suggestive" standard is inapplicable to pre-*Stovall* identifications because it is a prophylactic rule, the circuits split on the question of whether a post-*Stovall* identification procedure may be attacked as "unnecessarily" suggestive *(Stovall)* if it is not "impermissibly" suggestive *(Simmons)*.[6]

That narrow question was settled, however, in *Manson v. Brathwaite, supra,* this Court concluding that the *Simmons* standard was applicable to both pre- and post-*Stovall* identifications. *Manson* might be interpreted, as did the dissent, as one in which the Court "dismantle[d] the protections against mistaken eyewitness testimony erected a decade ago in [*Wade, Gilbert,* and *Stovall*]." However, the Court continued to recognize the *Simmons* standard of inadmissibility where there is "a very substantial likelihood of irreparable misidentification" 53 L.Ed.2d at 155 and

[6]See, *e.g.*, Grano, *"Kirby, Biggers* and *Ash:* Do any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 Mich.L.Rev. 719-798, at 773-779.

left open to attack identification procedures which, by interfering with the right of cross-examination, "go to the very heart—the 'integrity'—of the adversary process." Note 14, 53 L.Ed.2d at 140, quoting the concurring opinion in *Clemons v. U.S.*, 133 App. D.C. 27, 48, 408 F.2d 1230, 1251 (1968).

For reasons which are made very clear in the fact statement of the petition in this case, this is not the sort of case in which it is sufficient to rely upon "the good sense and judgment of American juries," *Manson, supra,* 53 L.Ed.2d at 155, to rectify misidentification, because hypnosis gives the semblance of reliability and scientific certainty where in fact there is none, and by its very nature interferes with the ability to cross-examine witnesses.

The key phrase in the *Simmons* standard is "irreparable misidentification." The Court has recognized in all the cases that the true danger of suggestive pretrial identification procedures is that an initial misidentification may not be rectifiable through the ordinary device of cross-examination, and that the purpose of the stringent rules adopted in the Wade Trilogy and subsequent cases is to mitigate that danger. The essential defect of hypnosis is that if there is misidentification it is inevitably irreparable. The California Court of Appeal's decision is incomprehensible unless read as having ignored the word "irreparable." A reversal by this Court is essential to demonstrate that the *Simmons* standard cannot be so construed.

Even under the best of circumstances, examples of convictions based upon false identification are legion.[7] When the unnecessarily suggestive procedure of single-photo show-up is combined with subsequent hypnotic memory "enhancement," those dangers are so great that the procedure "offend[s] those canons of decency and fairness which express [our] notions of justice," and truly "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 169, 172, 96 L.Ed. 183, 72 S.Ct. 205 (1952), cited in *Manson, supra,* 53 L.Ed.2d at 153. The present case gives this Court the opportunity and duty to demonstrate that it has not abandoned those principles.

CONCLUSIONS

The totality of the circumstances in this case demand that the decision of the California Court of Appeal be overturned, as in violation of the petitioner's Fifth and Sixth Amendment rights. While a flat rule that hypnotically-induced identifications are inadmissible may prove necessary, that issue need not be reached by the Court. Because of the widespread threat to the criminal justice system which hypnosis presents, however, the Court should hold that hypnotically-induced eyewitness identification is "imper-

[7]For numerous examples, see Grano, *supra*, 72 Mich.L.Rev. 719-798, Notes 112-114, 420-421 and accompanying text.

missibly suggestive," *Simmons, supra,* except under clear safeguards such as those suggested by Dr. Orne in the accompanying affidavit.

Dated, San Francisco, California,
June 1, 1978.

EPHRAIM MARGOLIN,
NICHOLAS C. ARGUIMBAU,
By EPHRAIM MARGOLIN,
Attorneys for Amicus Curiae.